Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

TOP RANK, INC.,

Petitioner,

v.

FLORIDA STATE BOXING COMMISSION, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the District Court of Appeal of Florida, First District

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a state tax on pay-per-view television programs that applies only to telecasts of boxing programming, but not to other televised pay-per-view programs or any other cable programs, violates the First Amendment as a content-based restriction on speech.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, respondents include Aleida O. Waldman, Chairperson, Florida State Boxing Commission; Alvin E. Estrin, Edwardo R. Lacasa, Donald Perry, and Jerry Wages, Members, Florida State Boxing Commission; Florida Depa[illegible]nt of Business & Professional Regulation; Chris Meffert, Executive Director, Florida Department of Business & Professional Regulation; and Robert F. Milligan, Comptroller, State of Florida. Appellants in the court below also included America Presents, Ltd. and Showtime Networks Inc., neither of which is a petitioner before this Court.

CORPORATE DISCLOSURE STATEMENT

Petitioner Top Rank, Inc. has no parent corporation, and no publicly held company owns 10 % or more of Petitioner's stock.

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PETITION FOR A WRIT OF CERTIORARI

Top Rank, Inc. respectfully petitions this Court for a writ of certiorari to review the judgment of the District Court of Appeal of Florida, First District, in this case.

OPINIONS BELOW

The decision of the Circuit Court of the Second Judicial Circuit and for Leon County, Florida, is unreported and reprinted in the attached appendix ("App.") at 1a. The decision of the District Court of Appeal of Florida, First District (App. 6a) is reported at 837 So. 2d 496 (Fla. Dist. Ct. App. 2003). The decision of the Supreme Court of Florida denying discretionary review (App. 17a) is reported at 848 So. 2d 1157 (Fla. 2003) (table).

JURISDICTION

The Supreme Court of Florida issued its decision denying discretionary review on June 17, 2003. Because the Florida Supreme Court's denial of discretionary review is not a judgment on the merits, *see Barone v. Scandinavian World Cruises, Ltd.*, 531 So. 2d 1036 (Fla. Dist. Ct. App. 1988), certiorari is sought from the decision of the District Court of Appeal of Florida, First District. *See* Robert L. Stern, *et al.*, *Supreme Court Practice* 166 (8th ed. 2002) ("Should the [state's highest] court decline to exercise its authority, the judgment of the intermediate court rather than the order of refusal by the higher court is the judgment reviewable under §1257.") (Citing cases). An application for an extension of time in which to file this petition was granted by Justice Kennedy on August 29, 2003, extending the time in which to file the petition to October 15, 2003. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech, or of the press." The relevant provisions of Florida law are reproduced in the appendix at 27a-31a.

STATEMENT OF THE CASE

Florida, like many other states, imposes a tax on the proceeds of boxing matches held within its borders. That tax is not at issue in this case. What is at issue here is the tax Florida imposes when a boxing match is held *outside* the state but *viewed* in Florida, as part of a television program made available on a pay-per-view basis.

Many major professional world championship boxing television programs are distributed in the United States to residential households exclusively via pay-per-view television. Boxing programming is in the forefront of this entertainment communications medium, which permits fans, for a per-event fee, to view a fully-produced television program at the same time that the live event takes place in a city like Las Vegas, Nevada. The Florida tax in question is imposed not on all pay-per-view programming seen in Florida – not, for instance, on pay-per-view concerts, motion pictures, or other sporting events – but only on pay-per-view boxing programming.

Florida's tax on boxing programming is a content-based restriction on speech that plainly violates the First Amendment. The decision below upholding the tax is at odds with this Court's precedents and with decisions of courts in California, Georgia, and Oregon invalidating functionally identical taxes on boxing programming. As the first decision validating such a tax, it is likely to embolden other states and

other state regulatory commissions to enact or enforce similar – and similarly unconstitutional – taxes in an effort to enhance revenues. And the Tax Injunction Act, 28 U.S.C. §1341, makes it unlikely that any other federal court will have an opportunity to address the problem. This Court's immediate review is warranted.

A. Florida's Tax on Pay-Per-View Boxing Programming.

Florida's Joe Lang Kershaw Act, Fla. Stat. Ann. §§ 548.001-.079 (2000) ("Boxing Act"), regulates the sports of professional boxing and kickboxing in the state of Florida. The portion of the statute relevant here is § 548.06, which requires that boxing promoters pay a tax of five percent on the "gross receipts" derived from boxing matches. Taxable "gross receipts" are defined by the Boxing Act to include income from ticket sales and concessions and also the "gross price charged for the sale or lease of broadcasting, television, and motion picture rights." Fla. Stat. Ann. § 548.06(1)(a)-(c) (App. 27a).

The statute authorizes the Florida State Boxing Commission ("Commission") to promulgate and enforce implementing regulations. *Id.* at § 548.003; Fla. Admin. Code Ann. r. 61K-1.001, *et seq.* (the "Boxing Regulations"). Rule 61K1-1.040 of the Boxing Regulations applies the boxing tax to matches held within the state of Florida. Under that rule, the promoter of an in-state match must file with the Commission a report of all gross receipts and a tax payment of five percent of the total amount. Fl. Admin. Code Ann. r. 61K1-1.040(3).

Matches held outside the state of Florida – like the matches at issue in this case – are covered by a different rule. Rule 61K1-1.042 applies to all matches "viewed within Florida, whether originating in Florida or not." *Id.* at r. 61K1-1.042(4). Under that rule, promoters are required to pay a tax of five percent on each pay-per-view order by a Florida

subscriber of a boxing program telecast[1] into that state. Unlike Rule 61K1-1.040, which imposes reporting obligations on promoters, Rule 61K1-1.042 enlists local cable operators as the source of information. Those operators are required to report to the Commission the "number of [pay-per-view] orders sold." The Commission uses that report to calculate the tax owed, providing the promoter with a summary of the data obtained from cable operators and a tax bill of five percent on the gross receipts from each pay-per-view order. *Id.* at 61K1-1.042(6). As the Commission puts it, the "actual broadcast[s]" of boxing programming become the "measure" of the tax imposed on the promoter. Appellees' Answer Brief in Florida Court of Appeals ("Appellees' Answer Br.") at 5-6.

B. Factual Background.

Petitioner Top Rank, Inc. ("Top Rank") is a Nevada corporation that promotes boxing matches and produces pay-per-view cable television boxing programs. This case involves matches promoted by Top Rank, held outside the state of Florida, and subject to the Florida tax on boxing programming under § 548.06 and Rule 61K1-1.042.

1. In its role as promoter and producer, Top Rank performs many functions that are comparable to those of a motion-picture producer. Top Rank is responsible for arranging a compelling boxing event that will appeal to a large number of viewers, both at the live venue and by pay-per-view television. *See* Plaintiffs' Mem. in Opposition to Defendants'

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[1] The term "telecast" refers to the transmission of pay-per-view and other cable programming by cable television system operators. "Broadcast," by contrast, has traditionally been used to refer to the transmission of free over-the-air programming by the broadcast television networks. Lower courts considering the question presented – including the court below – often use the terms interchangeably to describe the means by which pay-per-view boxing programming is made available to home viewers.

Motion to Dismiss and Strike and in Support of Plaintiffs' Motion for Summary Judgment at 7 (Affidavit of Robert Arum) ("Arum Aff."). After considering various boxers' records, professional standing, reputation, persona and popularity, Top Rank selects and contracts with two "main event" boxers.[2] *Id.* In connection with that selection, Top Rank also creates a theme for the fight, such as "Revenge," "Redemption," "Warriors," "Latin Fury," or "Fight of the Millennium," and selects a city and arena to serve as the setting for its event. *Id.* at 7-8.

To complete the final program available for telecast, Top Rank combines the main bout with featured "undercard" matches and selects a ring announcer. In some instances, Top Rank selects the television announcers who provide live blow-by-blow and color commentary; in others, that function is performed by Top Rank's pay-per-view television distributor, *see infra* at 7. Together with its television distributor, Top Rank also participates in the production of documentary features about the boxers and the sport of boxing, including personal interviews, commentary, and excerpts from prior bouts, to be shown as part of the final pay-per-view program. Top Rank publicizes and promotes the event through extensive publicity materials, posters, and produced television and radio spots, and by staging press conferences and other public relations events around the country. *See* Arum Aff. at 7-8.

As a result of these efforts, the fully produced television program ultimately seen by pay-per-view viewers is much more than just a televised boxing match. Before the featured bout begins, television audiences see hours of undercard

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[2] Top Rank's boxing programs over the years have featured bouts of, among other greats of the sport, Muhammad Ali, Sugar Ray Leonard, Roberto Duran, Marvelous Marvin Hagler, Tommy Hearns, George Foreman, and Oscar De La Hoya.

matches, commentary, and related interviews and documentary features. Each fight is televised from multiple cameras and angles, selected with the television viewer in mind, and is accompanied by blow-by-blow and color commentary. In short, the boxing programming produced by Top Rank includes, but is not limited to, a boxing match. *See United States Satellite Broad. Co. v. Lynch*, 41 F. Supp. 2d 1113, 1121 n.8 (E.D. Cal. 1999) (describing pay-per-view boxing programming).

Indeed, the pay-per-view telecast itself often becomes a newsworthy event, independent of the underlying boxing match. Program commentators include well-known and award-winning journalists, whose opinions and commentary on a wide range of issues – including corruption, health and safety, and conflicts of interest – spark lively public debate. In one recent example, following the September 13, 2003, bout between Oscar De La Hoya and Shane Mosley, there was widespread media discussion as to whether the pay-per-view program's announcers created an erroneous impression that De La Hoya had easily won the fight, and whether a "punch stat" recording of blows thrown and landed was an accurate and desirable measure of success in a boxing match. *See, e.g.*, Mike Penner, *The Inside Track*, Los Angeles Times, Sept. 17, 2003, at D2 (discussing controversy); Matt Eagan, *The Big Story*, Hartford Courant, Sept. 15, 2003, at C2 (same).

2. Top Rank holds the copyright to each pay-per-view boxing program it promotes and produces. To distribute the program (as well as to assist in production, *see supra* at 4-5), Top Rank licenses a television distributor, such as Showtime Pay Per View ("Showtime PPV") or HBO Pay Per View ("HBO PPV"). That distributor arranges for national distribution of the program to local cable system operators and satellite television operators, who in turn make the program available to individual viewers on a pay-per-view basis.

For purposes of this case, it is important to understand that Top Rank does not sell its television rights to these pay-per-view programs. Instead, Top Rank licenses limited exhibition rights through a licensed distributor or sub-distributor, retaining a major portion of the total proceeds from the eventual pay-per-view telecast (usually in the range of 50 percent) and the right to exploit all other rights to the program. The distribution works as follows: Individual viewers pay their cable television system operators a fee for their pay-per-view orders. The cable system operators, by separate sub-licensing agreements with a distributor, deduct a percentage of the retail price paid by pay-per-view subscribers from those proceeds before passing them on to the distributor. Pursuant to its licensing agreement with Top Rank, the distributor then deducts a percentage fee from the proceeds before passing the remaining balance on to Top Rank. If for some reason there is in fact no telecast of a particular boxing program, then there are no proceeds to distribute to Top Rank.

3. After each of the pay-per-view telecasts at issue in this case, Top Rank received a demand letter and an accompanying tax invoice from the Florida State Boxing Commission. The demand letters were the same in substance: all sought to obtain from Top Rank a tax of five percent on each payment made by a viewer in Florida to order the pay-per-view telecast of boxing programming.

On February 9, 2000, for instance, the Commission sent Top Rank a demand letter "in reference to the pay-per-view telecast of the De La Hoya/Trinidad boxing match," held on September 18, 1999, in Las Vegas, Nevada. Brief of Top Rank, et al., Florida District Court of Appeal, at App. 3, reprinted at App. 18a. Pursuant to Rule 61K1-1.042, the Commission attached a report of the information it had obtained from local cable system operators, listing the number of pay-per-view orders placed, the amount paid by the view-

ers, and the tax due. For example, the listing for Cablevision, one cable operator, shows 429 orders at $49.95 each, for a total price of $21,428.55 and a corresponding tax on Top Rank of $1,071.43 (or five percent of the total amount). App. 19a. All told, the Commission calculated the tax owed on pay-per-view telecasts in Florida of the September 18, 1999, Las Vegas fight at $234,555.37, due within 15 days of the receipt of the demand letter. *Id.* at 26a.

Top Rank paid the five percent tax on pay-per-view programming related to four fights held outside the state of Florida in 1997 and the first part of 1998. Since that time, Top Rank has refused to pay the tax on programming related to six additional matches, all held outside the State of Florida, on the ground that the tax violates the First Amendment.

C. Proceedings Below.

1. Top Rank filed suit against the Commission in the Circuit Court of Leon County, Florida. It did not challenge the tax applicable to proceeds of live boxing events held in Florida. Rather, Top Rank challenged only the tax imposed on telecasts of boxing programming featuring matches held outside the state of Florida. That tax, Top Rank alleged, which applies only to boxing programming, constitutes a content-based restriction on speech in violation of the First Amendment. Top Rank sought a refund of taxes already paid, as well as an injunction against the imposition of further taxes under the Florida statute and implementing regulations.[3]

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[3] In addition to Top Rank, plaintiffs in the trial court included America Presents, Ltd., another boxing promoter subject to the tax, and Showtime Networks Inc., which has been licensed as the national pay-per-view distributor for several boxing events through its Showtime PPV division. America Presents has since ceased doing business, and is no longer involved in this case. Showtime Networks Inc. was dismissed from the case for lack of standing by the trial court. That decision was affirmed on appeal, App. 16a, and the standing issue is not before this Court.

On cross-motions for summary judgment, the circuit court rejected Top Rank's claim and awarded judgment to the Commission. App. 4a. According to the circuit court, the "First Amendment is not implicated in this case" because the tax in question is not a tax on telecasts of boxing programming but rather a tax on the "sale of the intangible right" to televise boxing programming. *Id.*

2. On January 8, 2003, the First District Court of Appeal of Florida affirmed the decision of the circuit court. The court began by attempting to distinguish three other cases in which courts had held that state taxes imposed on pay-per-view telecasts of boxing programming (and only boxing programming) violated the First Amendment. *See United States Satellite Broad. Co. v. Lynch*, 41 F. Supp. 2d 1113 (E.D. Cal. 1999); *Showtime Networks, Inc. v. Georgia State Boxing Comm'n*, No. 1999CV04184, slip op. (Ga. Super. Ct. Nov. 23, 1999);[4] *TVKO v. Howland*, 15 Or. Tax 335 (2001), *aff'd*, 73 P.3d 905 (Or. 2003). Those cases are different, the court held, because they involved taxes on "the actual broadcast of a fight" and were assessed "directly against the broadcaster or cable operator." App. 9a. Here, by contrast, the court held, the tax falls directly on Top Rank and is assessed on the "privilege of promoting a boxing match." *Id.* at 16a.

The court went on, however, to acknowledge that, under *Simon & Schuster, Inc. v. Members of the N. Y. State Crime Victims Bd.*, 502 U.S. 105, 112 (1991), the fact that Top Rank does not itself broadcast or disseminate the programming in question is not dispositive. "[I]f we were dealing with either pure speech or symbolic speech, we would be required to reject the [Commission's] argument that merely because a person or entity may be several steps removed from the actual dissemination of speech, they are not enti-

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[4] For the Court's convenience, *Showtime Networks, Inc.* is reprinted in the appendix at 32a.

tled to First Amendment protections." *Id.* at 11a. For the court below, then, the crucial question was not whether the tax is paid by a telecaster or by Top Rank, but rather whether the tax burdens expressive activity protected by the First Amendment. *Id.*

In applying this standard, the court below did not consider whether the boxing programming produced and promoted by Top Rank for pay-per-view television distribution constitutes protected speech. Instead, it framed the inquiry as whether the "act of boxing" involves "either pure or symbolic speech." *Id.* at 12a. Reviewing precedents rejecting, *inter alia*, a claim that "roller skating is [] a constitutionally protected activity," *id.* at 13a, the court concluded that the "act of boxing" is not protected by the First Amendment and that the Florida tax is therefore constitutional. *Id.* at 15a ("the regulated activity in this case is clearly distinguishable from the pure speech which was regulated in *Simon & Schuster*").

Finally, at no point in its opinion did the court address the fact that all of the bouts at issue in this case took place outside the state of Florida. As a result, the court did not consider whether Florida had any legitimate interest in regulating "communications of and about the event" rather than "the event itself." *TVKO*, 15 Or. Tax at 345.

3. The Florida Supreme Court denied discretionary review in an order issued on June 17, 2003. App. 17a.

REASONS FOR GRANTING THE WRIT

I. FLORIDA'S CONTENT-BASED TAX ON PAY-PER-VIEW BOXING PROGRAMS VIOLATES THE FIRST AMENDMENT.

This case involves a tax on pay-per-view television programs of a single specified content: boxing programs. Florida does not subject any other pay-per-view program (nor any other cable program at all) to this tax, but instead singles out boxing programming for disparate tax treatment. The tax

is shouldered entirely by a small handful of producers of television programs, including petitioner. That kind of content-based taxation is anathema to the First Amendment, and is subject to strict judicial scrutiny under this Court's precedents. The Commission has never even attempted to demonstrate that the State has a compelling interest in regulating the communicative aspects of an out-of-state boxing event *viewed* in Florida. Nor could it. Accordingly, the tax is unconstitutional.

A. Florida's Tax, Targeted Only At Pay-Per-View Boxing Programs, Is An Impermissible Content-Based Restriction on Speech.

"[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972). Content-based speech restrictions are thus subject to strict scrutiny, and they are invalid unless "necessary to serve a compelling state interest" and "narrowly drawn to achieve that end." *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987). Laws "burdening . . . speech . . . must satisfy the same rigorous scrutiny" as laws "banning speech," *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 812 (2000), and a statute is thus "presumptively inconsistent with the First Amendment if it imposes a *financial burden* on speakers because of the content of their speech." *Simon & Schuster*, 502 U.S. at 115 (emphasis added). And, most directly pertinent here, the Court has applied that principle to *taxes* on speech, utilizing strict scrutiny to invalidate discriminatory taxes imposed upon some speakers but not others. *See, e.g., Arkansas Writers' Project*, 481 U.S. at 221; *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575 (1983); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936); *see also Leathers v. Medlock*, 499 U.S. 439, 447 (1991) ("[f]or reasons that are obvious, a tax will

trigger heightened scrutiny under the First Amendment if it discriminates on the basis of the content of taxpayer speech").

1. The tax at issue here plainly regulates speech on the basis of "its subject matter, or its content." *Mosley*, 408 U.S. at 95.[5] Florida subjects the transmission of one kind of cable program, and no other, to taxation, and the taxable program is defined expressly by its content: pay-per-view *boxing* programming. No other cable programming – indeed, no other pay-per-view telecast – is taxed. As a result, the state Commission must inquire into the content of a cable telecast in order to assess its tax. If, for instance, the subject of a pay-per-view telecast is a live concert performed in Las Vegas, then no Florida tax applies; if instead the pay-per-view telecast involves a boxing match held in Las Vegas, then the tax is imposed. *Cf. Arkansas Writers' Project*, 481 U.S. at 230 ("In order to determine whether a magazine is subject to sales tax, Arkansas' 'enforcement authorities must necessarily examine the content of the message that is conveyed' . . . Such official scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment's guarantee of freedom of the press" (quoting *FCC v. League of Women Voters*, 468 U.S. 364, 383 (1984).)

The tax at issue here is thus a classic content-based restriction on speech. Florida "has not chosen to apply" a "general" tax to cable telecasts or even to pay-per-view telecasts. *See Minneapolis Star,* 460 U.S. at 581. Instead, it has "created a special tax that applies only to certain" telecasts "protected by the First Amendment." *Id.* This is not a close

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[5] "The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." *Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 537 (1980).

case. Under the Court's own precedents, it is manifestly clear that the Florida tax regime makes content-based distinctions between taxable and non-taxable telecasts. *Id.*; *see also Burson v. Freeman*, 504 U.S. 191, 197 (1992) ("Whether individuals may exercise their free speech rights . . . depends entirely on whether their speech is related to a political campaign. The statute does not reach other categories of speech, such as commercial solicitation, distribution, and display."); *Mosley*, 408 U.S. at 95 (invalidating as content-based an ordinance distinguishing between picketing "on the subject of a . . . labor-management dispute" and all other picketing).

2. Because it is content-based, Florida's tax is subject to strict scrutiny under the First Amendment. *See Arkansas Writers' Project*, 481 U.S. at 231; *Leathers*, 499 U.S. at 447. That is so regardless of whether the content-based restriction is "intend[ed] to suppress certain ideas." *Simon & Schuster*, 502 U.S. at 117 ("our cases have consistently held that illicit legislative intent is not the *sine qua non* of a violation of the First Amendment") (internal quotations and citations omitted). Discriminatory financial treatment of speech is suspect under the First Amendment not because it *necessarily* reflects an "improper censorial motive," *id.*, but because it allows for the *possibility* that the "government may effectively drive certain ideas or viewpoints from the marketplace," *id.* at 116.

Indeed, content-based taxes like this one present a special risk that the government "may effectively drive certain ideas" from the marketplace. A tax imposed exclusively on a few out-of-state entities like Top Rank may not be subject to the ordinary political-process checks that come into play when a state taxes a larger group of its own constituents. As a result, it may be easier for a state (or state agency) to enforce a low-visibility restriction on disfavored speech or speakers. Unless strict scrutiny is rigorously enforced, any

out-of-state programming that is viewed only by a small in-state audience – even controversial political programming or minority religious programming – may be singled out for specially burdensome treatment.

3. Florida's tax on boxing programming plainly cannot survive the requisite strict scrutiny. Indeed, the Commission has never even suggested that the tax is necessary to achieve a compelling state interest. The generation of tax revenue is not a sufficient justification for a content-based speech restriction. *See Minneapolis Star*, 460 U.S. at 585. And the Commission, of course, has no legitimate – let alone compelling – interest in directly regulating a boxing match *itself* if that match is held outside the state of Florida (as were all the matches at issue in this case).

What is left is only an interest in regulating the *communicative* aspects of an out-of-state boxing match, which do reach into the state of Florida via pay-per-view. *See TVKO*, 15 Or. Tax at 345 (tax on pay-per-view telecasts of out-of-state boxing matches must be justified by regulatory interest not in "the event itself," but in "communications of and about the event"). But rather than compelling, that regulatory "goal is presumptively unconstitutional." *Minneapolis Star*, 460 U.S. at 585. In short, the state has offered no compelling justification for its content-based tax scheme because there is none.

B. The Position Of The Commission And The Court Below – That The First Amendment Is "Not Implicated" By The Florida Tax – Is Meritless.

The Commission has never argued in this case either that the Florida tax on boxing programming is content-neutral or that it is necessary to serve a compelling interest. Instead, the Commission argues – and the courts below agreed – that none of that matters, because the tax does not implicate the First Amendment at all. But in order to take that position, the Commission and the Florida courts are required to mis-

characterize the nature of the tax in question and to ignore controlling Supreme Court precedent. In fact, and under this Court's case law, the First Amendment is squarely implicated by Florida's content-based tax on boxing programming.

1. The Commission's principal argument is that the First Amendment does not apply to this case because the Florida tax is imposed on boxing "promoters," rather than on cable television operators. Appellees' Answer Br. at 5 (arguing that "[n]o broadcaster has ever been assessed or paid the tax because the law simply does not allow such an assessment"). The court below agreed, holding that, unlike boxing programming taxes ruled unconstitutional in other jurisdictions, the Florida tax is not "assessed directly against the broadcaster or cable operator who directly transmitted the fight to the viewers." App. 9a. Instead, the court concluded, "Section 548.06 specifically applies only to a promoter." *Id.* at 10a.

a. The distinction drawn by the Commission and the Florida court between petitioner Top Rank, on the one hand, and cable television operators, on the other, is entirely without First Amendment significance. Top Rank may be deemed a "promoter" by the Florida Boxing Act, but it functions as a producer of boxing pay-per-view programming and a licensor of that programming to distributors such as Showtime PPV. *See supra* at 4-6. For First Amendment purposes, that puts Top Rank on the same footing as a cable programmer. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 628 (1994) ("The cable television industry includes both cable operators (those who own the physical cable network and transmit the cable signal to the viewer) and cable programmers (those who produce television programs and sell or license them to cable operators)."). Top Rank's activities thus constitute expressive activity entitled to the same protection as those of cable television operators. *See id.* at 636 ("Cable

programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment").

Florida cannot avoid the dictates of the First Amendment by unilaterally categorizing Top Rank as a "promoter" under the Boxing Act. The relevant question is not what Florida calls Top Rank, but rather whether Top Rank's activities are protected by the First Amendment. Neither court below addressed that question. Had they, they would have been required to acknowledge that a content-based tax imposed on petitioner Top Rank implicates the First Amendment just as surely as would one imposed on a cable television programmer or operator.

b. The purported distinction between a content-based tax imposed on Top Rank and one imposed on a cable television operator fails for a second and independent reason. Even assuming, *arguendo*, that Top Rank has no distinct speech interest of its own, it unquestionably plays a critical role, as producer and licensor, in the ultimate transmission of cable television programming to viewers. And as this Court has held, the state may not impose a content-based financial burden at *any* point in the chain of production and dissemination of speech.

In *Simon & Schuster*, the Court considered New York's "Son of Sam" statute, which put in escrow the income earned by authors who wrote works of specified content. The state defended the statute on the ground that it did not operate directly on the media – with its generally protected speech interest – but rather on any "entity" contracting with a covered author. 502 U.S. at 117. The Court rejected that argument. It is irrelevant, this Court held, whether a covered "entity" generally engages in activities deemed communicative for First Amendment purposes. When it plays a role in production or distribution of speech by contracting with an author, it "becomes by definition a medium of communication if it

was not one already." *Id.* And the state cannot impose a content-based burden at any stage of the process by which the speech is produced and distributed – on the author, the publisher, or any other participant; wherever the burden falls, it amounts to a "financial disincentive only on speech of a particular content." *Id.* at 116.

Simon & Schuster controls this case. Contrary to the view of the court below, the fact that "we are not dealing with taxation of a member of the media," App. at 12a, is entirely beside the point.[6] Like the contracting "entities" in *Simon & Schuster*, Top Rank "becomes by definition a medium of communication" when it participates in the production and licensing of pay-per-view boxing programming. Under *Simon & Schuster*, the state may no more impose a content-based tax on Top Rank than it may on a cable system operator, or on any other participant in the process by which the programming is produced and distributed to viewers.

Simon & Schuster's proscription is entirely sensible in assessing the permissibility of a tax like this one. Regardless of which entity *directly* bears the burden of a content-based tax or financial penalty, the practical outcome is the same: the cost of producing and distributing a particular kind of speech is higher and the returns are lower. For example, cable system operators – who are under no federal-law obligation to carry specific pay-per-view events – could pass on the cost of any tax imposed directly on them simply by adjusting the purchase price of their sublicensing agreements with distributors. *See supra* at 7. The entity upon which the state places the initial tax burden – be it Top Rank or a cable system operator – has very little bearing on how the cost of the

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[6] "[T]he characterization of an entity as a member of the 'media' is irrelevant for these purposes. The government's power to impose content-based financial disincentives on speech surely does not vary with the identity of the speaker." *Simon & Schuster*, 502 U.S. at 117.

tax is ultimately allocated. *See generally* Richard A. Posner, *Economic Analysis of Law* 57 (5th ed. 1998) (an "initial assignment of property rights will not affect the ultimate use of property if transactions are permitted and are not highly costly"). Thus, *Simon & Schuster* quite properly rejected what would have been an entirely formalistic distinction between a content-based tax imposed on an entity like Top Rank and one imposed on a cable system operator.

2. Both the Commission and the courts below adopted a second argument (similar to their first) for why the First Amendment does not come into play in this case: because the tax in question "is imposed on the sale of the intangible right to broadcast or televise, and not on the actual broadcast or telecast." Appellees' Answer Br. at 18; *see* App. 4a (trial court); *id.* at 16a (appellate court). That argument is incorrect both as a matter of constitutional law and as a matter of fact.

a. Under *Simon & Schuster*, it makes no difference for First Amendment purposes whether a content-based tax is imposed on the "intangible *right* to broadcast or televise" or on the broadcast or telecast itself. Either Top Rank pays a tax – and thus earns less for its efforts – when it licenses the right to distribute its boxing programming, or it pays a tax – and thus earns less for its efforts – when its boxing programming is telecast to viewers. Either way, the tax amounts to a "financial disincentive only on speech of a particular content," 502 U.S. at 116, subject to the strictest scrutiny under the First Amendment.

b. In any event, it is perfectly plain that the tax in question here is imposed on the "actual telecast" of boxing programming and not on some "intangible right to broadcast." The Commission's demand letters, App. 18a, allow for no other interpretation. In accord with Rule 61K1-1.042, those letters list the number of Florida customers who ordered a pay-per-view telecast and the retail amount each customer paid for his or her order – a retail price that varies

paid for his or her order – a retail price that varies from cable system to cable system. The tax due is calculated at five percent of the total retail amount paid for a given pay-per-view telecast. *Id.*; *see supra* at 7-8. Even the Commission concedes that actual telecasts are used to "measure" the tax due, arguing only that there is a "vast" – but unexplained – "difference between a tax on a broadcast" and a tax "measure[d]" by broadcast revenues. Appellees' Answer Br. at 5-6. In fact, there is no such difference, "vast" or otherwise. A bookstore tax "measured" by the price paid for copies of J.D. Salinger's *The Catcher in the Rye* and no other book is a tax on *The Catcher in the Rye*. And a boxing tax "measured" by the price paid for pay-per-view boxing telecasts is a tax on boxing telecasts.

It is equally clear that the tax in question is not and could not be a tax on the "intangible right to broadcast." As explained above, *see supra* at 7, what Top Rank receives from its licensees is not a flat purchase price but a "license fee" enabling Top Rank to receive a percentage of the proceeds from the ultimate pay-per-view telecast. The fee is paid in exchange for the right to distribute and exhibit a telecast produced elsewhere; no transfer of rights has taken place in Florida. As a result, it is simply not possible to separate the sale of "broadcast rights" from the "broadcast" itself: if for some reason there is no telecast in Florida, then Top Rank receives nothing and there is nothing for Florida to tax. The Commission's unsupported assertion that the tax "is not dependent on whether a fight is actually broadcast or not" is thus flatly incorrect. *See* Appellees' Answer Br. at 19.

Second, even if there were a sale of "broadcast rights" that generated revenue independent of actual telecasts, that sale would be wholly outside Florida's power to tax. *See TVKO*, 15 Or. Tax at 346 ("Oregon has no jurisdiction to regulate boxing matches held outside the state"). An execution by Top Rank, a Nevada corporation, of a licensing agreement

with Showtime PPV or HBO PPV for national distribution rights to boxing programming generated in Nevada is not itself a "taxable event" in Florida. *See, e.g., Great Atl. & Pac. Tea Co. v. Grosjean*, 301 U.S. 412, 424 (1937) (state may not tax the "exercise or enjoyment of a right or privilege in another state derived from the laws of that state and therein exercised and enjoyed"); 1 Laurence H. Tribe, *American Constitutional Law* § 6-8, at 1074 (3d ed. 2000) ("the Court has articulated virtually a *per se* rule of invalidity for extraterritorial regulations – *i.e.*, laws which directly regulate out-of-state commerce, or laws whose operation are triggered by out-of-state events"). What makes Top Rank subject to Florida taxation at all is the fact that its boxing programming is sublicensed to Florida cable system operators and telecast to Florida viewers – which is why the Commission must and does impose its tax on the actual telecasts viewed in Florida.

3. The court below advanced one final rationale for its holding that the First Amendment has no application to this case. At one point in its opinion, the court appeared to acknowledge that *Simon & Schuster* renders irrelevant distinctions between promoters and cable system operators, or between taxes on "broadcast rights" and taxes on "broadcasts" themselves: "[I]f we were dealing with either pure speech or symbolic speech, we would be required [by *Simon & Schuster*] to reject the Boxing Commission's argument that merely because a person or entity may be several steps removed from the actual dissemination of speech, they are not entitled to First Amendment protections." App. 11a. But the First Amendment still was not implicated, the court held, because the "act of boxing does not involve either pure or symbolic speech," and so the Florida tax does not burden expressive activity at all. *Id.*

The question in this case, of course, is not whether the "act of boxing" is symbolic speech protected by the First

Amendment. This case involves pay-per-view television programming, not a live boxing match. And the Court need not address the First Amendment status of the "act of boxing" to decide that a content-based tax on the telecast of one kind of pay-per-view programming – boxing programming – is subject to strict scrutiny under the First Amendment. What Florida "seek[s] to regulate and tax is not the event itself but communications of and about the event. That is no different than if a newspaper or magazine had printed pictures of the boxing match." *TVKO*, 15 Or. Tax at 345. Thus, "it simply does not matter in the instant case whether the First Amendment protects or even applies to boxing. . . . The First Amendment does not protect murder, yet the court feels confident that news broadcasts of murder, killing, or war may not be censored to suppress their content." *United States Satellite Broad. Co.*, 41 F. Supp. 2d at 1121.

The reasoning of the court below would leave much of what is now thought to be protected expression outside the ambit of the First Amendment. The "Son of Sam" law at issue in *Simon & Schuster*, for instance, would be sustained: the law targeted communications about criminal activity, and criminal activity is neither pure nor symbolic speech for First Amendment purposes. And producers of news programs, documentaries, and reality shows would all find themselves stripped of First Amendment protection because the underlying activity recorded and broadcasted does not itself constitute pure or symbolic expression. Such a result would be wholly inconsistent with this Court's precedents. *See Leathers*, 499 U.S. at 444 ("Cable television provides to its subscribers news, information, and entertainment. It is engaged in 'speech' under the First Amendment, and is, in much of its operation, part of the 'press.'").

II. THIS COURT'S IMMEDIATE INTERVENTION IS REQUIRED TO RESOLVE THE STATUS OF STATE TAXES ON BOXING PROGRAMMING.

1. In three states, taxes functionally identical to the one at issue here have been invalidated, and are now unenforceable. Only in Florida can the Commission continue to reap the financial benefits of a content-based tax on boxing programming originating outside the state. That is an untenable situation warranting this Court's review.

a. In Oregon, California, and Georgia, taxes on pay-per-view boxing programming have been held impermissible under the First Amendment. The Oregon tax, paid by "promoters" of out-of-state boxing events and imposed on in-state telecasts of boxing programming, was invalidated by an Oregon tax court, *TVKO*, 15 Or. Tax at 345-46, in a decision affirmed by the Oregon Supreme Court, 335 Or. 527 (2003). The California tax, which imposed a five percent gross receipts tax on all pay-per-view telecasts of boxing programming, *see* Cal. Bus. & Prof. Code § 18600 *et seq.*, was invalidated as a content-based restriction on speech by a federal district court in *United States Broadcasting Company*. *See* 41 F. Supp. 2d at 1123. And in *Showtime Networks, Inc. v. Georgia State Boxing Commission*, No. 1999CV04184, slip op. (Ga. Super. Ct. Nov. 23, 1999), a Georgia state court invalidated the Georgia Boxing Act, Ga. Code Ann. § 43-8A-1 *et seq.* (2000) (repealed 2001), which required, *inter alia*, that a telecast "promoter" pay a tax of eight percent on gross receipts derived from pay-per-view telecasts of boxing programming.

The court below purported to distinguish this uniform line of cases on the ground that none of them "involve taxation of a boxing promoter." App. 9a. In fact, both the Oregon and Georgia statutes invalidated under the First Amendment did directly tax boxing "promoters." *See* Or. Rev. Stat. 463.015(13)(b) (2001) (amended 2003) (defining "pro-

moter"); Ga. Code Ann. § 43-8A-40(b) (2000) (repealed 2001) (same). But more fundamentally, for First Amendment purposes it makes no difference whether the tax falls directly on a boxing "promoter" or not. As discussed above, petitioner Top Rank is a "promoter" under the Florida statute but also produces boxing programming for pay-per-view telecast – an activity that brings it well within the scope of the First Amendment. *See supra* at 15-16. And regardless of Top Rank's status, a tax imposed on particular telecasts based on content – a feature the Florida tax has in common with those litigated in California, Oregon and Georgia – is in any event unconstitutional under *Simon & Schuster*. *See supra* at 16-18. For all First Amendment purposes, these taxes are identical, and the decisions from California, Oregon and Georgia cannot be distinguished away.

b. This situation will not repair itself without the Court's intervention. Oregon's highest court has passed on the issue, with the result that enforcement of the Oregon tax is permanently barred. In Georgia and California, the state chose not to appeal lower court rulings invalidating the state taxes, so as a practical matter, those taxes are unenforceable, as well. And though the decision below was rendered by the First District Court of Appeal, it effectively establishes the law statewide in Florida. Challenges to Florida state taxes may only be brought in the First District in Tallahassee, where this case will serve as binding precedent in any future action. *See Carlile v. Game & Fresh Water Fish Comm'n*, 354 So. 2d 362 (Fla. 1977) (describing state's "home-venue privilege"). In short, no further development in any of these states is likely to cure the disparity of results: three states have properly enforced this Court's First Amendment precedents and forgone the proceeds of an unconstitutional tax, while one state, Florida, continues to collect a plainly unconstitutional, content-based tax on cable programming.

Review by this Court is especially important because no other federal court is likely to have an opportunity to consider the issue. Under the Tax Injunction Act, 28 U.S.C. § 1341, a federal district court may intervene to enjoin a state tax on First Amendment (or any other) grounds only in narrow and exceptional circumstances.[7] As a result, state taxes like this one are almost always subject to review only in state courts – the courts most likely to feel "home state" pressure not to deprive their citizens of needed tax revenues. The system of review established by the Tax Injunction Act thus depends critically on this Court's willingness to scrutinize and invalidate unconstitutional state taxes, even in the absence of substantial federal law on the issue. *See Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 470 (1976) (if state courts do not satisfactorily address federal claim, recourse is review by this Court); *see also California v. Grace Brethren Church*, 457 U.S. 393, 410 n.22 (1982) (when federal district courts are divested of jurisdiction, protection of constitutional rights assured by "'legal right of appeal ultimately from the highest tribunal in the State to the United States Supreme Court'") (quoting remarks of Sen. Johnson, 78 Cong. Rec. 1916, 1918 (1934), on Johnson Act of 1934).

2. The issue presented by this case is a nationally important one. Taxes on boxing programming are not confined to

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[7] The district court decision invalidating the California tax on boxing programming is just such an exceptional case. The Tax Injunction Act precludes federal district court action unless there is no "plain, speedy, and efficient" means of challenging and recovering a tax under state law. 28 U.S.C. § 1341. Because California law barred any state action for injunctive relief or refund of the boxing programming tax, the district court held, federal court action was "the only means available" for redress and hence permitted under the Tax Injunction Act. *See* 41 F. Supp. 2d at 1119-20.

the four states discussed above, in which their status has been litigated. Comparable taxes are on the books – though not, to petitioner's knowledge, actually enforced – in several additional states. Oklahoma law, for instance, authorizes a four percent boxing programming tax, imposed on "telecast promoters" and collected on gross receipts of all in-state telecasts, regardless of where a boxing event takes place. *See* 2003 Okla. Sess. Law Serv. Ch. 331. In Pennsylvania, both promoters and producers of pay-per-view boxing programming are subject to a tax on gross receipts "attributed to the individual pay-per-view telecast fees" for any boxing telecast shown in the state. *See* 5 Pa. Cons. Stat. Ann. §§ 302 & 916. The decision below, if allowed to stand, may encourage states like these to begin enforcing laws that they had previously been unwilling to defend.

The problem is not confined to states with statutes that expressly allow for taxes on boxing programming. The implementation and administration of boxing taxes is often delegated to state boxing commissions, which may implement taxes on boxing programming via rule-making. In Missouri, for instance, the state Department of Economic Development, acting pursuant to broad statutory authority, *see* Mo. Rev. Stat. § 317.006, had at one time required that anyone holding the Missouri distribution rights for a closed-circuit boxing event pay a five percent Missouri tax on the proceeds. That regulatory requirement was rescinded, however, following the decisions invalidating the California and Oregon boxing programming taxes. *See* Mo. Code Regs. Ann. tit. 4, § 40-3-011(8) (2001) (rescinded May 30, 2002). The decision below, on the other hand, will give Missouri's Department of Economic Development, like similar state regulatory agencies around the country, the incentive to resuscitate its aggressive enforcement of a tax on boxing programming.

At a time when states are increasingly in need of new revenue sources, the impact of the decision below is likely to be especially widespread. States and state agencies that had previously believed – in light of uniform case law – that taxes on boxing programming violated the First Amendment can be expected to revisit the issue. And the result is likely to be an increasingly stark division between states and state courts that are prepared to enforce the First Amendment at the expense of tax revenues, and those that are not – without the possibility of review by lower federal courts. The issue is squarely presented by this case, has been reviewed by several other courts, and requires no further factual or legal development. This Court should step in now and resolve the status of state taxes on boxing programming.

CONCLUSION

For the reasons stated, the Court should grant the petition for a writ of certiorari.

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